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MONTANA PROSECUTOR

SEPTEMBER - DECEMBER/1981

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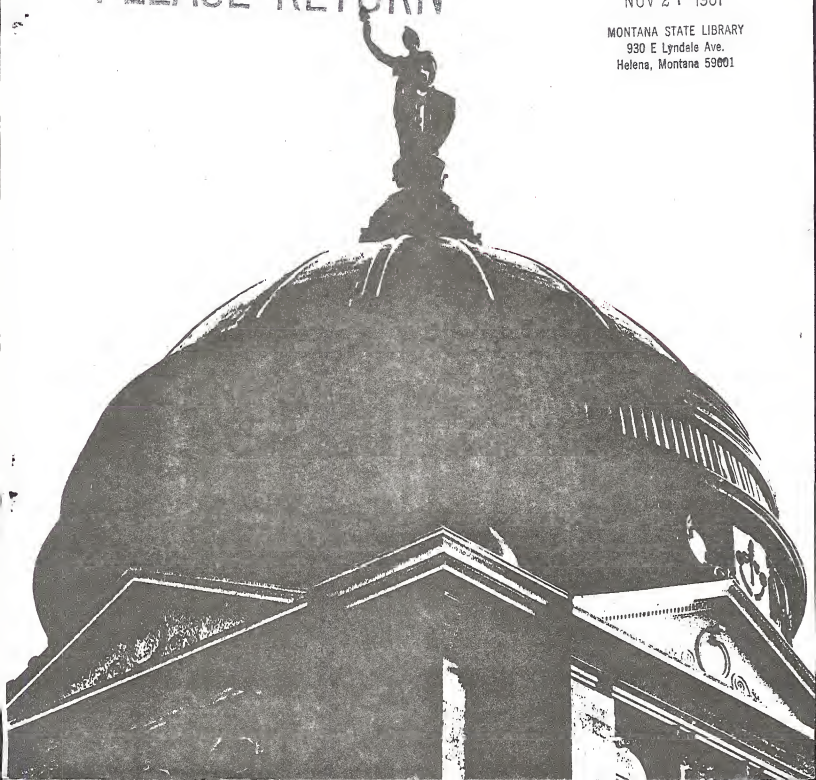
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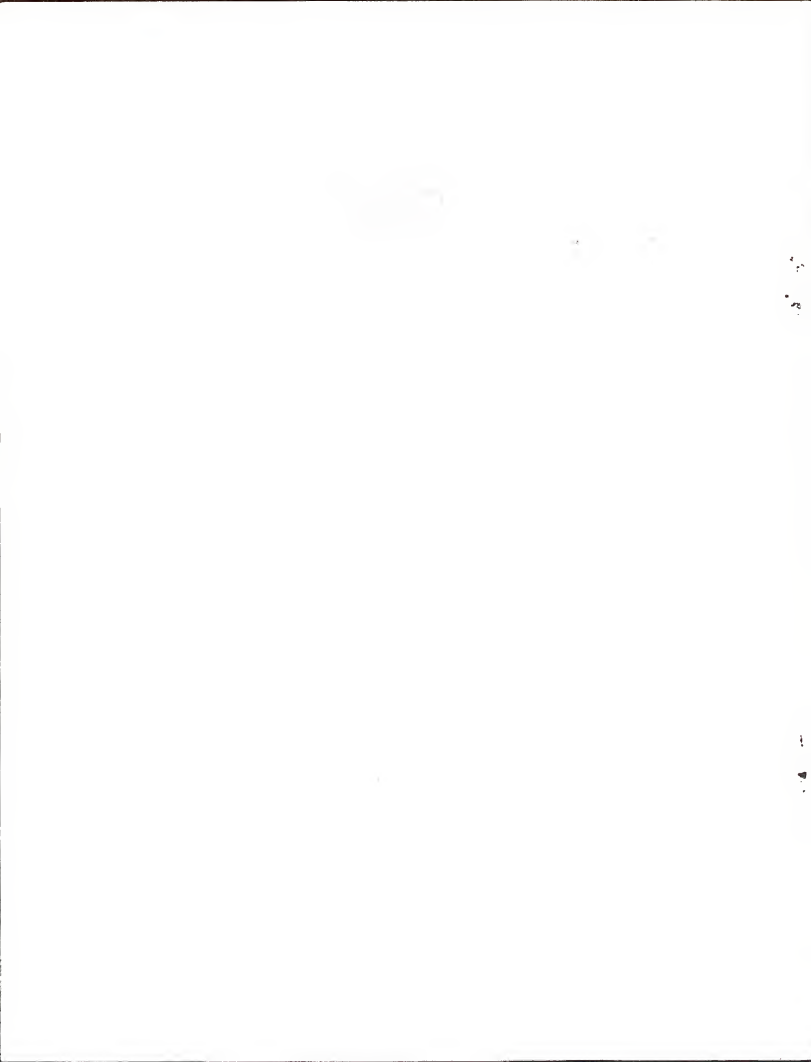
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INTRODUCTORY NOTES

The schedule of events for the Juvenile Justice Seminar in Billings, Montana on December 2,3, and 4, 1981 at the Ramada Inn (Homesteader Room) is as follows:

WEDNESDAY, DECEMBER 2, 1981

8:00 - 9:00 a.m.	Registration
9:00 - 10:15 a.m.	Juvenile Justice In the 80's - Wallace Mylniec, Professor, Director - Juvenile Justice Clinic Law Center, Georgetown University, Washington, D.C.
10:15 - 10:30 a.m.	Break
10:30 - 12:00 noon	Juvenile Justice In the 80's (Cont.)
12:00 - 1:00 p.m.	Lunch
1:00 - 2:45 p.m.	Update on Federal Law And Cases Affecting Juvenile Justice - Wallace Mylniec
2:45 - 3:00 p.m.	Break
3:00 - 5:00 p.m.	Waiver Hearings And Trying Juveniles Waived To Adult Court - Honorable Jerry L. Mershon, District Judge, Manhattan, Kansas

THURSDAY, DECEMBER 3, 1981

9:00 - 10:15 a.m.	Medical Identification Of Child Abuse And Neglect - Barton Schmitt, M.D., Department Of Pediatrics, University of Colorado, Denver, Colorado
10:15 - 10:30 a.m.	Break
10:30 - 12:00 noon	Sexual Abuse of Children - Barton Schmitt, M.D.
12:00 - 1:00 p.m.	Lunch
1:00 - 3:00 p.m.	Investigation And Prosecution Of Child Snatching Cases - Christopher Foley, Assistant District Attorney Milwaukee, Wisconsin, Child Custody Project, Washington, D.C.
3:00 - 3:15 p.m.	Break
3:15 - 4:30 p.m.	Montana Child Advocacy Project - Noel K. Larrivee

FRIDAY, DECEMBER 4, 1981

9:00 - 10:00 a.m.	Streambed Preservation - Role of The County Attorney - Norm Peterson - Habitat Preservation Officer - Dept. of Fish, Wildlife and Parks
10:00 - 10:15 a.m.	Break

FRIDAY, DECEMBER 4, 1981 (Cont.)

10:30 - 11:00 a.m.	Col. Robert W. Landon, Administrator, Highway Patrol Division - An Introduction And DWI Discussion
11:00 - 12:00 noon	Business Meeting - MCAA
12:00 noon	Adjourn

Topics to be discussed at the business meeting will include the continuation of support for an NDAA representative and a lobbyist by the Association, and a gambling actions update. No registration fee will be charged. For attendance reservations call Karen Ferreira at 449-3816 and for accomodation reservations call the Ramada Inn at 248-7151.

FRAUDULENTLY OBTAINING DANGEROUS DRUGS

All county attorneys are reminded that House Bill 110 (Chapter 389, Session Laws), which took effect October 1, 1981 amends the penalty for fraudulently obtaining dangerous drugs set forth in section 45-9-106 from six months in the county jail to not less than one nor more than five years upon the first conviction, and not less than five nor more than 10 years upon a second conviction.

RECENT CASES AND NOTES

ARREST - STOP AND FRISK

In an airport narcotics case officers had neither reasonable suspicion nor probable cause to seize appellate. However, their stop was not a seizure within the Fourth Amendment since defendant voluntarily answered all their questions and allowed himself to be searched. "He could as easily have elected not to cooperate and simply walked away." United States v. Moreno (5th Cir.) 649 F.2d 309.

The Ninth Circuit upholds the finding by a district judge that an alien, who was stopped by officers acting authoritarily, did not reasonably believe she was free to walk away and therefore was detained without probable cause. Among other facts that helped the defense were that when she was finally told she did not have to consent to a search, she did not, and when she was finally told she did not have to stay she left. United States v. Patino (9th Cir.) 649 F.2d 724.

ARREST - TRAFFIC OFFENSE

After hearing a CB report that a little blue truck was all over the road, the police officer saw the blue truck pull into a tavern and the driver get out and head for the tavern. There was no arrest or stop when the officer asked the driver to wait and talk to him. The officer's observations of defendant's weaving walk, etc. were probable cause to arrest for DWI. State v. Tracy (Or.App.) 630 P.2d 370.

CONTINUANCES - TRIAL IN ABSENTIA

Where defendant was seriously ill and had already been granted numerous continuances and uncontradicted testimony was presented that his condition would continue to deteriorate, the Court properly denied a further continuance and proceeded with trial in defendant's absence. Dasher v. State (Ga.App.) 278 S.E.2d 465.

DISMISSALS - PROSECUTOR

The trial court abused its discretion in refusing to dismiss a lesser charge so the State could preserve its right to a jury trial on the sanity issue in the greater charge. The trial court should grant prosecutorial dismissal motions unless there is clear and convincing evidence the "interests of the defendant or the public are jeopardized by the district attorney's refusal to prosecute." People v. Lichtenstein (Colo.) 630 P.2d 70.

EXTRADITION

Discrepancies between the description of the fugitive in the extradition papers and defendant were insufficient to prevent extradition where the name, birthdate and social security numbers were the same. Guy v. Nelson (Colo.) 630 P.2d 610.

EVIDENCE DESTRUCTION - FINGERPRINTS

Throwing a Coke can back in the garbage after the officers lifted a print, which proved to be defendant's, from it was not evidence destruction. To call such conduct evidence destruction would require police to seize all doors, refrigerators, cars, wall sections, etc. as evidence if fingerprints were found on them. "The hapless victim might justifiably decide that the investigation was worse than the crime." State v. Duran (N.M.) 630 P.2d 763.

EVIDENCE - PUBIC HAIRS

Defense evidence that head and pubic hairs belonging to a third party were found in the rape/murder victim's apartment was properly rejected since defendant failed to show their connection with a person who could have committed the crime. (Defendant was seen near the scene, had the items stolen from the victim, his hairs matched others found at the scene, and he admitted the murder to jailmates.) State v. Bradfield (Wash.App.) 630 P.2d 494.

IDENTIFICATION - HANDCUFFS

The trial judge did not have to wait for defendant to actually be disruptive before ordering him brought before the jury bound and gagged for an in-court identification. There was no error in this procedure; defendant was repeatedly warned it would happen if he were disruptive, and he repeated his threat to be disruptive. People v. Moody (Colo.) 630 P.2d 74.

IMMUNITY

Use immunity survives another constitutional ambush including allegations of violations of the Fourth, Fifth and Sixth Amendments in United States v. Kember (D.C.Cir.) 648 F.2d 1354.

JURORS

Careful instructions by the trial court meant that an eleven-day separation between evidence and instructions, caused by an ill juror, was not grounds for reversal. United States v. Diggs (9th Cir.) 649 F.2d 731.

JURY - OATH

Failure to swear in the jury until after the first witness completed testifying was waived by failure to object and was harmless error. Hollis v. People (Colo.) 630 P.2d 68.

MIRANDA

Defendant's request to speak to "someone" about the rape with which he was charged was insufficient to invoke defendant's right to counsel. Among other things, this defendant signed two rights waiver forms. State v. Killay (R.I.) 430 A.2d 418.

OPEN MEETING LAWS

Their constitutionality is upheld and so are defendant's convictions for violating them in Hilliary v. State (Okla. Cr.) 630 P.2d 791.

PRIOR BAD ACTS - BRIBES

Evidence that defendant telephoned the victim and offered the victim restitution for the stolen property was properly admitted even though it showed defendant committed another crime. The evidence showed defendant was not mistakenly identified and showed a "significant connection between the offeror and the crime committed." Miller v. State (Okla. Cr.) 630 P.2d 789.

PRIOR BAD ACTS - WEAPONS

Evidence that defendant used an illegal sawed-off shotgun in an attempted murder was properly admitted as part of the res gestae. Evidence that defendant was driving a stolen car at the time was admissible to prove motive for shooting an officer during a traffic stop. State v. Brown (La.) 398 So.2d 1381.

PROSECUTORS - IMMUNITY

A part-time prosecutor who files criminal charges to further his private purposes does not have absolute immunity. Beard v. Udall (9th Cir.) 648 F.2d 1264.

SEARCH AND SEIZURE - WITNESSES

A witness cannot block the use of evidence which was illegally seized from him by refusing to testify about the evidence in the trial of third parties. United States v. Kember (D.C. Cir.) 648 F.2d 1354.

SEXUAL ASSAULT - PRIOR BAD ACTS

Evidence of subsequent offense by defendant, even though it involved a third party, was admissible to negate possibility that defendant's touching of juvenile's genitals was accidental or misunderstood by the boy. Moore v. Com. (Va.) 278 S.E.2d 822.

TRAFFIC OFFENSES - OPINIONS

Allowing the arresting officer to give his opinion about whether defendant was a safe driver at the time he was arrested for DWI is upheld. Fletcher v. State (Ga.App.) 278 S.E.2d 444.

TRAFFIC OFFENSES - RADAR

Speeding conviction upheld on basis of patrol car's speedometer reading which had been tested for accuracy by a radar which had been tested for accuracy by a tuning fork. There is no need to prove the accuracy of a tuning fork, overruling previous dicta. State v. Trantolo (Conn.Super.) 430 A.2d 465.

VOLUNTARINESS OF STATEMENTS - INTOXICATION

Defendant's statements to police directly after shooting were voluntary even though defendant said he was drunk at the time and later could not remember what he said since his statements contained many pertinent events (which witnesses corroborated), and both officers and witnesses said defendant did not appear drunk. *Chisum v. State (Ark.) 616 S.W.2d 728.*



Drawing by Modell, 1977
The New Yorker Magazine Inc

"Never mind the 'You're not going to believe this.' Just answer the question, yes or no."

BURGLARY - MARRIAGE

The marital relationship and right of consortium are no longer common law bars to prosecuting a spouse for breaking and entering the other spouse's separate apartment when they no longer live together, but are not legally separated. Cladd v. State (Fla.) 398 So.2d 442.

DEATH PENALTY - PROSECUTIONS

Texas' death penalty statute is not unconstitutional on grounds that it is inflicted as a result of prosecutorial discretion which is not limited by guidelines or standards for determining its appropriateness in individual prosecutions. Fearance v. State (Tex.Cr.App.) 616 S.W.2d 207.

FRAUDULENT CHECKS - UTTERING

Attempting to pass a forged, third-party check to a landlord for rent is sufficient action to constitute an element of uttering. It is not essential that defendant attempt to cash the check. United States v. Jones (5th Cir.) 648 F.2d 215.

SEARCH AND SEIZURE - AIRPLANES

Where a defendant appears to have voluntarily abandoned an airplane by leaving it unattended, unlocked and in a hazardous location, and where he failed to contact airport authorities to make arrangements to have the plane repaired and/or moved, he had no legitimate expectation of privacy in the 2,081 pounds of marijuana seized from the plane. The defendant had no standing to challenge a warrantless search of the plane. United States v. Hunter (5th Cir.) 647 F.2d 566.

SEARCH AND SEIZURE - STANDING

Where it appears that a defendant has given up his rental interest in a motel room, i.e., his bill was paid in full, he stated he was leaving by checkout time, and he had left the room key locked in the room, he no longer had a legitimate expectation of privacy in the room. The Court was not persuaded by the defendant's claim that he had an expectation of privacy right up until the posted check-out time. The Court did not recognize as critical the fact that the room was entered prior to check out time to ascertain whether it was occupied and then searched. United States v. Hunter (5th Cir.) 647 F.2d 566.

CHARACTER

Defendant's offer of evidence that he was a "nice guy", a "good man" and "liked by the people" implied that he had a reputation for nonviolence. When he failed to object on cross-examination of his witnesses about his reputation for violence, it was clear he had put his character into issue, and evidence of his violent character was properly introduced. Salud v. State (Alaska App.) 630 P.2d 1008.

COUNSEL - WITNESSES

Where defense counsel's need to testify as a witness for his client arose late in the trial, the trial had lasted almost two weeks, and the subject of counsel's testimony was related to a collateral matter, the trial court properly rejected defendant's motion for mistrial. Commonwealth v. Floyd (Pa.) 431 A.2d 984.

DISCOVERY - WORK PRODUCT

Forcing the defense to disclose a witness's statement made to a defense investigator when the defense revealed they intended to impeach the witness from the statement, then allowing the prosecution to use the statement extensively did not violate the Fifth, Sixth and Fourteenth Amendments or the work product doctrine. People v. Small (Colo.) 631 P.2d 148.

DRUGS AND NARCOTICS - PARAPHERNALIA

This is the first decision to hold a statute based on the Model Drug Paraphernalia Act constitutional in its entirety. The Act is not impermissibly vague, overbroad, violative of privacy rights or unconstitutional despite its prior restraint on commercial speech. Casbah, Inc. v. Thone (8th Cir.) 651 F.2d 551.

ELECTRONIC EVIDENCE - TRANSCRIPTS

Allowing introduction of transcripts of defendant's call to the police, then allowing the jury to hear the tape recording of the call was proper. Commonwealth v. Stetler (Pa.) 431 A.2d 992.

EVIDENCE DESTRUCTION - TRAFFIC OFFENSES

The failure of the defense to try to test a blood sample during the eight months the State kept it refrigerated meant the appellate court gave little consideration to defendant's second suppression motion that the State destroyed evidence by not refrigerating the sample after it was introduced at a suppression motion. The original suppression of the blood sample because the State's expert failed to keep one gas chromatograph chart was reversible error. State v. Ketchersid (Or.App.) 630 P.2d 1312.

GUILTY PLEAS - PROSECUTORS

Washington follows the great majority of states and holds that without detrimental reliance on the part of the defendant, the prosecutor may withdraw from the plea bargain at any time before the plea is entered. State v. Wheeler (Wash.) 631 P.2d 376.

SEARCH WARRANTS - INFORMANTS

Statements which are made to an undercover police officer by a suspected accomplice during drug sales "can be presumed to be reliable in these circumstances since they 'were not made for the selfish purpose of currying favor with law enforcement to mitigate the punishment of [the individual's] own criminal acts, or with the ulterior motive of causing the arrest of the petitioner upon a false accusation.'" *People v. Fleming* (Cal.) 631 P.2d 38.



Drawing by Richard Decker, 1984
The New Yorker Magazine, Inc.

"The jury will disregard the witness's last statement."

INSTRUCTIONS - MIRANDA

Rejecting an instruction that if defendant was questioned before Miranda, any statement should be considered involuntary was correct. Possible Miranda violations are determined by the trial judge, not the jury. State v. Morse (Ariz.) 617 P.2d 1141.

MIRANDA

Where an officer received a complaint that defendant was sitting on a stolen motorcycle, walked up to three citizens at 12:00 noon in a shopping center parking lot, didn't tell defendant whether he could leave or not and didn't use or display force, the questioning was on-the-scene questioning which did not require Miranda. This was true even though the stolen property investigation had focused on the defendant, there was probable cause to arrest for a traffic violation and the officer felt that defendant was not free to go. "The unexpressed intent of a police officer to detain a suspect whom he is interrogating does not constitute 'custodial interrogation.'" State v. Morse (Ariz.) 617 P.2d 1141.

VOLUNTARINESS OF STATEMENTS

"[W]here the alleged promise is couched in terms of a mere possibility or an opinion, this is not deemed to be a sufficient promise so as to render a confession involuntary." An officer who told defendant that his cooperation would be reported to the warden, and it might have an effect on his request to be released from isolation, did not make a promise that forced defendant to confess involuntarily. Even if there was a promise, defendant bargained for it by starting the discussion and asking if he would be released from isolation if he confessed, so the "promise" did not overbear defendant's will. State v. McVay (Ariz.) 617 P.2d 1134.

ATTEMPTED ROBBERY

Evidence that defendant approached a liquor store with a rifle and tried to hide when he was spotted by a customer was sufficient to establish the requisite specific intent to support an attempted robbery conviction. People v. Vizcarra (Cal.App.) 168 Cal.Rptr. 257).

BRADY - WITNESSES

The state had no duty under Brady to disclose that a codefendant had moved to continue his sentencing until after he testified against defendant, and the continuance was not inherently coercive. The fact that codefendant retracted his statement implicating defendant prior to the trial, then retracted his retraction after getting the continuance did not make him incompetent as a witness. These circumstances do bear on credibility, but since the codefendant received no consideration from the state for his testimony and was subjected to extensive cross-examination on his motives, there was no error. State v. Rucker (Conn.) 418 A.2d 55.

ESCAPE - APPEAL

Defendant's appeal was dismissed upon his escape from custody. "An escapee has no right to appellate procedures while he remains a fugitive." Redden v. State (Del.) 418 A.2d 996.

EXPERTS - POLICE OFFICERS

A deputy sheriff has the requisite skill, knowledge and experience to qualify as an expert and testify as to the market price of street marijuana at a given time in his county. State v. Williams (Iowa) 305 N.W.2d 428.

INSTRUCTIONS - FLIGHT

Police testimony that defendant leaped over desk and ran, after he was ordered to halt, was sufficient for a flight instruction. Defendant's contention that he could not escape since the building was surrounded by armed police was without merit. Jones v. State (Ind.App.) 421 N.E.2d 15.

STATUTE OF LIMITATIONS - GUILTY PLEA

The statute of limitations is an affirmative defense which can be waived. Here, defendant's guilty plea to a crime he knew the statute had run on barred an appeal based on the statute four years later. United States v. Akmakjian (9th Cir.) 647 F.2d 12.

ARGUMENT

Opening statement reference to statements that the prosecutor thought would be admitted under co-conspirator's exception to the hearsay rule may have been unwise; it was not prosecutorial misconduct preventing a retrial. United States v. Calderon (9th Cir.) 618 F.2d 88.

BAIL - DEATH PENALTY

State permitting trial court to deny bail to defendants charged with "capital" crimes derives from serious nature of offense charged and not from fact that potential penalty was death. Thus, challenge of statute on basis that death penalty is unconstitutional has no merit. United States v. Kennedy (9th Cir.) 618 F.2d 557.

CROSS-EXAMINATION - WITNESSES

Defendant's right to cross-examine witnesses was not violated where the state introduced an oral confession by a codefendant that implicated defendant, although the codefendant denied any recollection of his incriminating statement. Here, defense counsel had a full opportunity to question codefendant regarding defendant's alibi defense and codefendant's memory lapse. Pohl v. State (Wis.) 291 N.W.2d 554.

HOMICIDE - MOTIVE

Where defendant was not charged with rape, but the homicide victim was found in a nude state and sexual position, it could reasonably be inferred that victim had been sexually molested. Consequently, cross-examination of defendant and psychiatric testimony regarding defendant's sexual history was relevant to motive for the crime. Bond v. State (Ind.) 403 N.E.2d 812.

HYPNOSIS

In prosecution for rape, the trial court properly admitted victim's testimony which had been induced by hypnosis. The value of the testimony, first discovered through hypnosis, was to be weighed by the jury. State v. Temoney (Md.Sp.App.) 414 A.2d 240.

INDIGENTS - INVESTIGATORS

A pro se indigent defendant must show why he needs to have an investigator appointed before the court has to determine whether he is entitled to one. Smith v. Enomoto (9th Cir.) 615 F.2d 1251.

SEARCH AND SEIZURE

An anonymous report that shots had been fired within a house, plus the officers hearing a round being chambered after they arrived, justified their warrantless entry to see if someone had been hurt despite the occupants' claim no one else was there. The officers acted properly in touring the house looking for injured persons, then securing the house until they got a search warrant to seize the narcotics they observed in plain view while looking for an injured person. People v. Stamper (Cal.App.) 164 Cal. Rptr. 861.

Where officers had probable cause to obtain a search warrant for stolen merchandise, mere fact that they "believed" that other stolen merchandise might be found did not defeat inadvertence requirement of the plain view doctrine. United States v. Liberti (2nd Cir.) 616 F.2d 34.

SEARCH AND SEIZURE - ABANDONMENT

The search and seizure of defendant's suitcase at an airport security checkpoint was legal since defendant denied ownership of the suitcase and its contents and therefore had no reasonable expectation of privacy. The court interpreted defendant's denial of ownership as an abandonment of any property interest he may have had in the suitcase. (Good collection of authority of abandonment.) United States v. Canady (5th Cir.) 615 F.2d 694.

ATTEMPTED HOMICIDE

A defendant cannot be convicted for attempted negligent homicide. People v. Hernandez (Colo.App.) 614 P.2d 900.

SEARCH WARRANT - INFORMANT

A search warrant was properly issued even though it was based on information from a secret informant, the defendant's estranged wife who the defendant left in order to live with his secretary. Neither the marital privilege nor the adverse spousal communications privilege prevented use of the information in the search warrant. United States v. Lefkowitz (9th Cir.) 618 F.2d 1313.

VALUE - FOOD STAMPS

The testimony of the victim about the worth of the items taken was admissible and was sufficient to sustain defendant's conviction for a class 4 felony. Food stamps costing \$26 to \$30, which could be redeemed for \$90 in food, were properly valued at \$90 since that was what the owner could expect to receive from them. People v. Evans (Colo.App.) 612 P.2d 1153.

PRIOR BAD ACTS

Testimony by an accomplice that the accomplice and defendant planned both fires, the accomplice set both of them by using flammable liquids, and appellant "submitted blatantly fraudulent insurance claims for the fire damage" was a sufficient showing of common plan or scheme under Rule 404(b) to admit evidence of the first arson in appellant's trial for the second arson. State v. Mulligan (Ariz.) 613 P.2d 1266.

ARREST - PROBABLE CAUSE

Defendant coming out of an LSD "warehouse" under surveillance, coupled with his presence at another "buy" two weeks before, gave officers probable cause to believe he was a pusher who had renewed his supply and to arrest him. Probable cause is, "more than bare suspicion and less than proof needed to convict." State v. Neville (Minn.) 293 N.W.2d 37.

DWI - TRAFFIC OFFENSES

In prosecution for DWI, the intoxication was not involuntary where defendant knowingly and voluntarily consumed alcohol after taking a prescribed medication. The jury need only find that alcohol contributed to defendant's impairment to convict her. Intoxication is not a defense to DWI. State v. West (Me.) 416 A.2d 5.

SEARCH AND SEIZURE - DRUGS AND NARCOTICS

Where the landlord told defendant to be out by noon because he hadn't paid the rent, defendant lacked a reasonable expectation of privacy for drugs left in the refrigerator past noon, after he had almost completely emptied the apartment. Allowing an officer to testify about the street value of the drugs in a simple possession case was proper; the testimony helped prove that a total stranger didn't suddenly decide to stash the drugs in defendant's almost empty apartment. State v. Christian (Wash.App.) 613 P.2d 1199.

ARREST - SEARCH AND SEIZURE

Police may search a defendant's wallet incident to an arrest and xerox the contents for use in criminal prosecution. United States v. Passaro (9th Cir.) 624 F.2d 938.

COMMENT ON SILENCE

Prosecutor's comments to the jury: "There is no evidence to the contrary," and "you have been presented with no evidence inconsistent with [the state's evidence]," were neither direct or indirect references to defendant's failure to testify. State v. Manding (Mo.App.) 602 S.W.2d 207.

Cross-examination of defendant about her post-arrest silence and arguments about the silence were reversible error. Bernier v. State (Nev.) 614 P.2d 1079.

A single use of the generic term "defendant" was clearly intended to refer to the defense attorney and was not intended as a comment on appellant's silence. Even if the statement was taken by the jury to be a comment on the defendant's silence, the error was harmless. United States v. Passaro (9th Cir.) 624 F.2d 938.

DRUGS AND NARCOTICS - PARAPHERNALIA

City ordinance prohibiting sale of narcotics paraphernalia was found to be constitutional despite claims of cruel and unusual punishment, lack of reasonable relationship to state interest, excessive burdens on interstate commerce, and vagueness. Tobacco Road v. City of Novi (E.D. Mich., S.D.) 490 F.Supp. 537.

INDIANS

A footnote in the United States v. Farris (9th Cir.) 624 F.2d 890 indicated that a one-fourth Cherokee was a non-Indian in a case involving gambling operations on a Puyallup Indian reservation.

INSANITY - EXPERTS

The three defense psychiatrists were sufficiently discredited by cross-examination so that defendant's conviction was affirmed despite the fact the State did not present psychiatric testimony. State v. Summers (Hawaii) 614 P.2d 925.

MIRANDA

Defendant's comment during interrogation that he "might want to speak to an attorney", followed by his voluntary conversation with police officer after the officer told him that was his decision, did not amount to a violation of 5th Amendment. Here, defendant did not request counsel and chose not to remain silent. Turner v. State (Ind.) 407 N.E.2d 235.

PRIOR BAD ACTS - MOTIVE

In prosecution for aggravated assault on narcotics agent, evidence that defendant purchased drugs was admissible to establish the purpose of attempted arrest and defendant's motive in fleeing from officer. Norman v. State (Miss.) 385 So.2d 1298.

PRIOR CONVICTIONS

Evidence of a prior robbery conviction was properly admitted for impeachment purposes even though it was still pending on appeal. "A 'conviction' is the trier of fact's finding that defendant is guilty." People v. Beckham (App.) 167 Cal.Rptr. 18.

SEARCH AND SEIZURE - CONSENT

Defendant's consent to search his briefcase was not voluntary where government agent, who lacked probable cause, stated that search warrant would be obtained if consent were refused, and implied that defendant would be held in custody until warrant was issued. Detainment of defendant without probable cause would have been unlawful and the threat of such action precluded voluntary consent. U.S. v. Ocheltree (9th Cir.) 622 F.2d 992.

TRAFFIC OFFENSES - DWI

A call from a gas station attendant reporting a possible drunk driver along with the officer's observation of the speeding car was probable cause to make an investigatory stop. Officer's subsequent observance of defendant's appearance, slurred speech and odor of alcohol was probable cause to arrest. State v. Thompson (S.D.) 295 N.W.2d 8.

DWI - TRAFFIC

Refusals by two hospitals to conduct an independent blood test for defendant, unless the police ordered it, were not grounds for suppressing the breathalyzer results. Grizzle v. State (Ga.App.) 265 S.E.2d 324.



Drawing by Ross; '1967
The New Yorker Magazine, Inc.

"If there's one thing I can't stand, it's an appeal to my common sense."

COUNSEL - CONFLICT

In a three-two split the majority holds that the appearance of impropriety requires a public defender to disqualify himself if, in the course of his representation of the client, he must attempt to shift the blame for the crimes to another person, who was also represented by the public defender's office. The minority holds that it was an actual conflict of interest. *Rodriguez v. State* (Ariz.) 628 P.2d 950.

ARMED ROBBERY - INSTRUCTIONS

The court properly refused to give an instruction that "a shotgun is a deadly weapon if it is loaded." The evidence showed the robber entered the store and pointed the gun at the clerk briefly. "Where a person points a gun at another within firing range in the course of a robbery, the jury may infer that the gun was loaded." *State v. Armstrong* (Or.App.) 628 P.2d 1206.

ARREST - SEARCH AND SEIZURE

Shotgun shells discovered as police retrieved clothes from defendant's closet for defendant to wear when they took him into custody were admissible since they were found incident to a lawful arrest. *Commonwealth v. Lee* (Mass.) 419 N.E.2d 1378.

ASSAULT WITH A DEADLY WEAPON

Evidence that victim was stabbed with a sharp instrument with enough force to enter his body cavity and puncture a lung was sufficient for jury to conclude that victim was attacked with deadly weapon, despite the fact that neither the weapon nor a description of it was produced. *Wade v. State* (Ga.App.) 277 S.E.2d 292.

DEATH PENALTY - AGGRAVATING CIRCUMSTANCES

The death penalty was upheld where one aggravating circumstance was that the murder was committed during a robbery and kidnapping even though defendant was not charged and convicted of either offense. *Ruffin v. State* (Fla.) 397 So.2d 277.

DRUGS AND NARCOTICS - PRIOR BAD ACTS

When a defense of entrapment was asserted against drug charges, the prosecution was allowed to introduce evidence of a subsequent, extrinsic offense to rebut the defendant's claim that without inducement he would not have been "of a mind to commit the crimes." *United States v. Mack* (5th Cir.) 643 F.2d 1119.

IDENTIFICATION - THEFT

The fact that a victim testified that certain tapes admitted into evidence, which were stolen from her, were just like others in the same county did not render the tapes inadmissible. The particular tapes were with other items all of which had been pawned by defendant and were mentioned in his pretrial confession as having been taken from the victim. *Kelly v. State* (Fla.) 397 So.2d 709.

IMPEACHMENT - PRIOR INCONSISTENT STATEMENTS

Rule 613 does not prohibit the State from introducing prior inconsistent statements under Rule 801(d)(2), even if the defendant takes the stand and admits the prior inconsistent statements. A tape recording of the conversation between the informant and defendant was properly admitted; even though the informant's side of the conversation might be classified as hearsay, it was admissible, because without it the conversation did not make sense. United States v. Kenny (9th Cir.) 645 F.2d 1323.

SENTENCES

Where more than one victim was involved in the same incident, multiple consecutive sentences were properly imposed.

[W]hile unquestionably the citizen who is exposed to the injury or loss is a "victim" in the sense that he or she is victimized, it should never be forgotten that the crime is an offense against the peace and dignity of the State and that a "victim" of every crime is the people of the State. It is doubtful whether the people of Oregon ever intended to send a message through their legislature to criminals that no greater risk of conviction and punishment is involved regardless of how many citizens or their property are jeopardized so long as the criminal is embarked upon a single criminal episode with a single criminal objective. (emphasis supplied)

State v. Linthwaite (Or.App.) 628 P.2d 1250.

WITNESSES - POLICE OFFICERS

A police officer was properly allowed to testify about bullet trajectory since it was an observational opinion used to reproduce the situation for the jury and was "within the realm of perception of which the average man is capable. People v. Stokes (Ill.App.) 419 N.E.2d 1181.

